

Summary of Constitutional Court Ruling No. 3/2560 (2017)

Dated 20th December B.E. 2560 (2017)*

Re: The Council of Ministers requested for a Constitutional Court ruling under section 178 paragraph five of the Constitution on whether or not the Draft Memorandum of Understanding on Movement of Goods in Transit between Customs Department of the Kingdom of Thailand and General Department of Customs and Excise of the Kingdom of Cambodia was a treaty relating to free trade under section 178 paragraph three of the Constitution which required the approval of the National Assembly under section 178 paragraph two of the Constitution.

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1. Summary of background and facts

The Ministry of Finance submitted the Draft Memorandum of Understanding on Movement of Goods in Transit between the Customs Department of the Kingdom of Thailand and General Department of Customs and Excise of the Kingdom of Cambodia to the Council of Ministers for approval. A relevant agency submitted an opinion for consideration that the Draft Memorandum of Understanding had the characters of an agreement under section 178 of the Constitution, and whereas the substance of such Draft Memorandum of Understanding prescribed guidelines for operations relating to the land transit of goods, being provisions relating to freedom of transit as provided under article 8 of the General Agreement on Tariffs and Trade (GATT) and article 11 of the Trade Facilitation Agreement (TFA), under the World Trade Organisation, under which Thailand was a party, a question therefore arose as to whether or not such Draft Memorandum of Association was a treaty under section 178 paragraph three of the Constitution. If that was the case, there was a question as to whether or not the instrument would be deemed to be a treaty under section 178 paragraph two of the Constitution which required the approval of the National Assembly. The Council of Ministers thence referred the matter to the Constitutional Court for a ruling under section 178 paragraph five on whether or not the Draft Memorandum of Understanding was a treaty relating to free trade under section 178 paragraph three which required the approval of the National Assembly under section 178 paragraph two of the Constitution.

* Published in the Government Gazette Vol. 135, Part 17a, dated 16th March B.E. 2561 (2018).

2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court had the competence of accept this application for consideration under section 178 paragraph five of the Constitution.

After deliberation, the Constitutional Court found as follows. Under the application, this was a case where the Council of Ministers referred a question on whether or not the Draft Memorandum of Understanding on Movement of Goods in Transit between the Customs Department of the Kingdom of Thailand and General Department of Customs and Excise of the Kingdom of Cambodia was a treaty relating to free trade under section 178 paragraph three of the Constitution which required the approval of the National Assembly under section 178 paragraph two of the Constitution. Section 178 paragraph five of the Constitution provided that where there was a question regarding whether or not a treaty was a case under paragraph two or paragraph three, the Council of Ministers could request a Constitutional Court ruling. This case was therefore in accordance with section 178 paragraph five of the Constitution and the Constitution could accept the case for consideration.

3. The issues considered by the Constitutional Court

The Constitutional Court determined the following issues for ruling.

The first issue was whether or not the Draft Memorandum of Understanding on Movement of Goods in Transit between the Customs Department of the Kingdom of Thailand and General Department of Customs and Excise of the Kingdom of Cambodia was a treaty under section 178 of the Constitution.

After deliberation, the Constitutional Court found that the term “treaty” under section 178 of the Constitution retained the principle under section 224 of the Constitution of the Kingdom of Thailand B.E. 2540 (1997) and section 190 of the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Constitutional Court had previously defined the term as meaning all international agreements concluded between Thailand and a foreign country or international organisation in writing with an intent to create a legally binding obligation under international law, regardless of whether such agreement was recorded in one instrument or several connected instruments, and regardless of the name given. This definition matched the term “treaty” under the Vienna Convention on Law of Treaties 1969, and Vienna Convention on Law of Treaties between States and International Organisations or between International Organisations 1986.

This Draft Memorandum of Understanding on Movement of Goods in Transit between the Customs Department of the Kingdom of Thailand and General Department of Customs and Excise of the Kingdom of Cambodia, even though specified as executed at departmental level between the two countries, upon examination of the authorised signor in the Draft Memorandum of Understanding who would be executing the instrument on behalf of their respective governments, and the Ministry of Finance had requested for Council of Ministers

authorisation of the Director-General of the Customs Department to execute the Draft Memorandum of Understanding and requested the issue of Full Powers from the Ministry of Foreign Affairs, showed an intent to execute a Draft Memorandum of Understanding at governmental level. Therefore, the Draft Memorandum of Understanding had the characters of an international agreement concluded in writing between Thailand and Cambodia. The Draft Memorandum of Understanding, in essence, provided that each party had to facilitate the movement of goods in transit, prescribing rights and duties for each party. These provisions showed an intent to create a legally binding obligation under international law. The instrument therefore constituted a “treaty” under section 178 of the Constitution.

The second issue was whether or not the Draft Memorandum of Understanding was a treaty relating to free trade under section 178 paragraph three of the Constitution.

After deliberation, the Constitutional Court found that the term “treaty relating to free trade” under section 178 paragraph three of the Constitution had a wider meaning than a treaty establishing a “free trade area,” which represented only one dimension of free trade, being a measure to achieve free trade. The meaning of free trade was not restricted to the mutual liberalisation of trade by exempting or lowering taxes and duties, as well as the elimination of other barriers to import or export of goods or services to markets of state parties in a free trade area. However, the term extended to activities in other areas, including tax and non-tax measures, to facilitate and increase the efficiency of overall international trade and investments between countries in the most fair and free manner.

This Draft Memorandum of Understanding provided that each party should facilitate movement of goods in transit. The movement of goods in transit constituted a factor in facilitating international transport of goods, in line with article 5 of GATT and article 11 of TFA, which provided that a state party had to grant freedom of passage of goods to other countries in a non-discriminatory manner. This exhibited an objective to promote and expand economic and trade cooperation between the two countries on the basis of equal terms and mutual benefit principles in order to develop each country’s respective economics and reduce international trade barriers. This Draft Memorandum of Understanding was therefore a treaty with provisions relating to the international transit of goods aimed at eliminating trade barriers, being an aspect of free trade. Hence, the Draft Memorandum of Understanding was a treaty relating to free trade under section 178 paragraph three of the Constitution.

The third issue was whether or not the Draft Memorandum of Understanding constituted a treaty which could have a wide scale impact on economic security, society or trade or investment of the country pursuant to section 178 paragraph two of the Constitution.

After deliberation, the Constitutional Court found as follows. Section 178 paragraph two of the Constitution provided that treaties which the Council of Ministers had to seek approval of the National Assembly consisted of 4 types, namely (1) a treaty which provided for a change in Thai territorial boundaries; (2) a treaty which provided for a change in external territory over which Thailand enjoyed sovereign rights or jurisdiction pursuant to a treaty or international law; (3) a treaty which required the enactment of an Act for implementation;

and (4) other treaty which could have a wide scale impact on economic society, society or trade or investment of the country. In order to provide clarification for executive actions and minimize the burden of the legislature from having to deliberate and approve all treaties having the characters of (4), the Constitution defined such treaty specifically in paragraph three. Hence, when considering whether or not any other treaty which could have a wide scale impact on economic security, society or trade or investment of a country required the approval of the National Assembly, the substance of such treaty had to be examined and determined whether there was an impact on economic security, society or trade or investment of the country under paragraph two. The rule for applying and interpreting the Constitution dictated that, apart from following the black letters or wording of the Constitution, it was also necessary to consider the true spirit of the Constitution and common benefit of the nation as well as the overall well-being of the people pursuant to section 3 paragraph two of the Constitution. Since the revision of section 178 was intended to remedy interpretation problems that had arisen under the Constitution of B.E. 2550 (2007), causing difficulties for operations of state agencies and resulting in the approval of the National Assembly being sought in almost all cases, the application and interpretation of section 178 of the current Constitution should therefore lean towards the resolution of such problem. In other words, if all treaties relating to free trade under section 178 paragraph three were deemed to be other treaties having a wide scale impact on economic security, society or trade or investment of the country pursuant to the provisions of paragraph two, without regard to the extent of the impact, it would follow that all treaties relating to free trade would require the approval of the National Assembly, which would cause an even greater burden and obstacle to concluding an international agreement relating to free trade than in the past.

It was found that this Draft Memorandum of Understanding was merely an agreement between Thailand and Cambodia on procedures and practices relating to the facilitation of movement of goods in transit under GATT in order to ensure greater convenience for movement of goods in transit and align the understanding of both countries on the procedures and practices, with no substance on the prescription of customs tariffs which would directly affect the price of goods or restrictive quotas on imports that would have a wide scale impact on free trade, and consequently an impact on societal or economic structure or national trade and investments. Also, there was no rule on goods in transit which varied or added to the existing obligations of Thailand and Cambodia under article 5 of GATT. The exemption of transit goods customs tariff was in accordance with existing obligations under GATT. Moreover, Thailand already had the Customs Act B.E. 2560 (2017) which implemented such obligation. The outcome of such Draft Memorandum of Understanding would be to foster confidence and predictability for investors from both countries and promote Thailand's role as a logistical centre for the region. This was also consistent with the policies of both countries which aimed to develop the boundary areas and promote mutual connectivity, which was also beneficial to the overall relation between Thailand and Cambodia. Therefore, this Draft Memorandum of Understanding was a treaty relating to free trade which did not have a wide scale impact on economic security, society or trade or investment of the country pursuant to section 178 paragraph two of the Constitution.

4. Ruling of the Constitutional Court

The Constitutional Court held that the Draft Memorandum of Understanding on Movement of Goods in Transit between the Customs Department of the Kingdom of Thailand and General Department of Customs and Excise of the Kingdom of Cambodia was a treaty relating to free trade pursuant to section 178 paragraph three of the Constitution, but did not constitute a treaty which could have a wide scale impact on economic security, society or trade or investment of the country, and therefore did not require the approval of the National Assembly pursuant to section 178 paragraph two of the Constitution.
